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CHARLES ELMORE CRO
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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1936.

No. 175

MARCUS HAUGE,

Appellant,

vs.

CITY OF CHICAGO, a Municipal Corporation,

Appellee.

APPEAL FROM THE SUPREME COURT OF THE STATE OF ILLINOIS.

BRIEF AND ARGUMENT FOR APPELLEE.

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APPEAL FROM THE SUPREME COURT OF THE STATE OF ILLINOIS.

BRIEF AND ARGUMENT FOR APPELLEE.

STATEMENT OF THE CASE.

The appellant, Marcus Hauge, while hauling coal for one W. Burgess, an independent coal dealer or broker residing and doing business in Chicago, Illinois, under the name of Northern Coal Company, was convicted in the Municipal Court of Chicago of delivering a truck load of coal which had not been weighed by a public weighmaster, and for which a public weighmaster's weight certificate had not been issued, to a resident of Chicago named Tresca,

one of Burgess' customers, in violation of section 2947 of the Weights and Measures ordinance of the Revised Chicago Code of 1931. (R. 4, 9, 11, 15, 19, 20) This section relates to commodities sold in load lots and requires that every load of coal sold in load lots by weight, delivered by wagon, truck or other vehicle within the city, shall be weighed by a public weighmaster and that a public weighmaster's certificate of weight shall be delivered by the driver or person in charge of the vehicle to the purchaser or consignee of the load, or his agent, at the time of the delivery and before unloading. (R. 29)

On Hauge's appeal to the Supreme Court of Illinois that court affirmed the judgment of conviction and rendered an opinion upholding the validity and constitutionality of the ordinance. *City of Chicago* v. *Waters; City of Chicago* v. *Hauge; City of Chicago* v. *Gorman;* 363 Ill. 125, 1 N. E., (2d) 396; R. 45.

Hauge lived at Morris, Illinois, 62 miles southwest of Chicago. He testified that the delivery ticket was made out by Burgess. (R. 15) Hauge got the coal which he delivered to Burgess' customer, Tresca, at the mine of the Morris Coal and Mining Company in Morris, Illinois. (R. 13) He did not know Tresca before he delivered the coal. (R. 14) From Tresca he collected a flat price for the coal. The price he afterwards paid over to Burgess less his hauling charge. (R. 16, 17) Originally the coal was billed by the Morris Coal and Mining Company to Burgess. (R. 11, 20) Burgess split the load and had Hauge make deliveries to three of Burgess' customers, part of it to Tresca, part to a second customer, and the remaining part to a third customer. (R. 16) The delivery ticket made out by the Morris Coal and Mining Company to Burgess is shown on page 11, but the delivery tickets issued by Burgess to Tresca or the other customers do not

appear in the record. The Supreme Court of Illinois held that the contract of sale was made within the city limits of Chicago. It also held that Hauge was neither selected nor designated by the purchaser, Tresca, and Tresca, so far as he knew, did not pay any separate charge for the carriage of the coal. The price to him was net, delivered to him by the seller. (*City of Chicago* v. *Waters,* 363 Ill. 125, 129; R. 47) It was admitted by Hauge that the coal had not been weighed by a City of Chicago public weighmaster as was required by the ordinance and that the prescribed certificate of weight had not been used and was not in his possession for delivery to the purchaser. (R. 14; Appellant's brief, p. 4)

Section 2947 is part of an ordinance enacted by the City of Chicago in 1922, pursuant to the express delegation of authority contained in article V of the Cities and Villages act, chapter 24, Illinois Revised Statutes, giving power to cities in Illinois to regulate the inspection, weighing and measuring of coal and other commodities, to provide for the inspection and sealing of weights and measures, to enforce the keeping and using of proper weights and measures by vendors, and to license and regulate public scales.

This ordinance has twice been reviewed by the Supreme Court of Illinois and its validity upheld, once in the instant case and once in the year 1924 in the case of *City of Chicago* v. *Wisconsin Lime & Cement Co.* 312 Ill. 520, 144 N. E. 3. The *Wisconsin Lime & Cement Co.* case was taken to this court by writ of error and extensive briefs filed by the parties upon the constitutionality of the ordinance. By a *per curiam* opinion the case was dismissed for want of jurisdiction. *Wisconsin Lime & Cement Co.,* Plaintiff in error, v. *City of Chicago* (No. 141) 270 U. S. 626. The *Wisconsin Lime & Cement Co.* case was quite similar in its facts to the case at bar for the reason that that com-

pany maintained, in addition to its yard in Chicago, a coal yard in Oak Park, Illinois, from which it delivered considerable quantities of coal to Chicago consumers.

Hauge now seeks a further review by this court and claims that he is entitled to invoke the jurisdiction of this court upon the ground that the ordinance in question is violative of the first section of the Fourteenth Amendment to the Constitution of the United States.

Appellee, City of Chicago, has filed its statement of matters and grounds making against the jurisdiction of this court, also its motion to dismiss or affirm. By its order entered October 12, 1936 this court postponed further consideration of the question of jurisdiction and of the motion to dismiss or affirm to the hearing on the merits. In the statement opposing jurisdiction and in the motion to dismiss or affirm appellee has pointed out that this court might properly decline to take jurisdiction of the appeal. Though not reargued herein appellee relies upon the grounds set forth in its statement and motion and regards them as sufficient to warrant this court in dismissing the appeal or affirming the judgment of the Supreme Court of Illinois.

The lengthy statement of the case set forth in appellant's brief is argumentative, distorted and contains much that is misleading and highly improper. While we regret the necessity of correcting misstatements and pointing out overstatements it is felt that this must be done in order that this court may see the actual case.

On page 7 and 8 appellant sets forth the contents of a petition for rehearing presented to the Supreme Court of Illinois by certain parties living in the vicinity of the Morris mine who sought to appear as *amici curiae* after the Illinois Court had rendered its decision. Their application was denied. (R. 61) Yet counsel for appellant have desig-

nated this petition for printing and in their statement of the case set forth the contents of this petition and attempt to give it evidentiary force and value. It has no evidentiary value and, furthermore, contains statements which are patently false. For example, it states that there are no public weighmasters supervising scales in Chicago except in coal yards of competitors. The answer to this is that it is apparent on the face of the ordinance attacked that there are numerous other public weighmasters weighing many other commodities delivered in load lots whose scales are accessible to appellant. Furthermore, there is nothing in the record to support the statement that any coal yard will not permit the dumping of coal, and nothing in the record to support any one of the other extravagant statements contained in this petition. Manifestly this extraneous petition and the arguments made therein have no proper place in the record of this case. They do not furnish grounds upon which appellant can predicate an argument or a proper basis *for any judicial opinion or decision.* Much of the opinion of the dissenting justices of the Illinois Court set forth in appellant's statement of the case is based upon the extravagant and wholly unsupported statements contained in this rejected petition for rehearing and for this reason the dissenting opinion is not convincing.

Throughout his brief appellant speaks of this case as involving the business of delivering coal trucked direct from a mine located in Morris, Illinois, to a purchaser in Chicago, whereas in reality it involves a Chicago coal dealer's business in selling and delivering coal to a Chicago purchaser, the dealer utilizing the services of a nonresident trucker to haul the coal from Morris to Chicago. The legal right of nonresident mine owners and Chicago consumers to deal directly with each other is not involved

in this case. The transaction here is one between Burgess and Tresca, both residents of Chicago.

Appellant tries to create the impression that the enforcement of the ordinance requires the reweighing of coal which has already been weighed and its correct weight certified by a responsible authority in manner calculated to protect the purchaser. There was no public weighmaster's scale at Morris; all there was there was a scale maintained by the Morris Coal and Mining Company, which scale had been inspected as to mechanical accuracy under the Illinois Weights and Measures act. The statements made by appellant to the effect that the coal delivered by appellant Hauge had been "weighed at the mine in accordance with State statutes" and "weighed over State-inspected scales" are misleading; likewise the statement that a "mine weighmaster" certified the tare weight. The undeniable fact is that the coal was not weighed by a public weighmaster nor sold nor delivered with any public weighmaster's weight certificate. The ordinance before the court which requires a weighing by a public official and the issuance of a bonded public weighmaster's certificate of weight is the only protective measure which effectively guards the purchaser. When the weighing of the coal by a Chicago public weighmaster prescribed by the ordinance is the first weighing by a public weighmaster it is not fair for appellant to speak of this weighing as a "reweighing."

The statement contained on the delivery ticket issued to Burgess by the Morris Coal and Mining Company (R. 11) reading "Weighed by NHB, Public Weighmaster," when read with the purported certificate immediately following, if used to convince Burgess or Burgess' Chicago customer of the accuracy of the weight of the coal, works a fraud upon the purchaser. This certificate states that the coal "was weighed by a public weighmaster and the

seal attached hereto is a recognized authority of accuracy as prescribed by section 4204 of the Chicago Municipal Code of 1922, as amended Dec. 16, 1925 and Jan. 21, 1926.' Section 4204 was a section of the 1922 code, long since superseded by the Revised Chicago Code of 1931, and the record in the case at bar is conclusive as to the fact that the coal delivered by appellant Hauge had not been weighed by a public weighmaster and was not delivered with a public weighmaster's certificate of weight. (R. 10) As already said, the record merely shows that the coal consigned to Burgess was weighed at Morris on a State-inspected scale maintained by the Morris Coal and Mining Company for its own convenience. Both the city ordinance and the state law were violated in Hauge's delivery to Tresca. There is not even a delivery ticket in evidence to which Hauge can point as complying with the state law. Manifestly he may not rely upon the ticket furnished Burgess.

On page 4 appellant states that "the consumer in Chicago buys this coal from the mine either directly or through a local dealer, agent or broker." Constantly throughout his brief appellant attempts to present the case of the Morris Coal and Mining Company instead of the actual case of appellant Hauge. There is presented to the court for decision only the case of appellant Hauge which, as already stated herein, involves a transaction between Burgess, a Chicago coal dealer, and Tresca, his Chicago customer, Burgess utilizing the services of Hauge in delivering the coal to Tresca.

The statement found on page 5 to the effect that "the complaining mine companies cannot obtain weighmaster's certificates," which statement also appears in the dissenting opinion of the state court, finds no support in the

record. There are no "complaining mine companies" parties to the suit.

The statement on page 6 purporting to set forth the testimony of the president of the Morris Coal and Mining Company to the effect that that company's coal is involved and that it has had no complaints from its customers as to short weights is clearly immaterial to the issues involved in appellant Hauge's case.

SUMMARY OF ARGUMENT.

I.

The provisions of the ordinance, its history, and the purpose sought to be accomplished by it.

Sections 2947 and 3623 of the ordinance provide that every load of any commodity sold in load lots by weight, delivered by truck within the city, shall be weighed by a public weighmaster whose certificate of weight shall be delivered to the purchaser before any of the commodity is removed from the vehicle and that no weighmaster shall state in his certificate the tare weight of any vehicle until after he shall have weighed the vehicle.

Short weighing is an offense under other sections of the ordinance but such sections would be ineffectual without the means of control afforded by the provisions in controversy; the latter are absolutely essential to prevent short weighing and other frauds.

Illinois has no statute providing for weighmasters; the State inspects scales as to mechanical accuracy but makes no attempt to supervise the weighing; this function is left to the municipalities. Even though the scale be accurate

the purchaser is not protected if the weighing is not supervised.

Prior to the enactment of this ordinance conditions in Chicago is regard to short weighing, the use of padded weight tickets, the substitution of a different kind of coal from the coal billed, and the mixing of an inferior grade with coal of a superior grade and quality, had become so bad that many reputable dealers had asked protection from such unfair competition; without this salutary ordinance these frauds would again be unrestrained.

II.

There is no justiciable controversy involved in this case; the existence of the evil of short weighing being admitted, the method of dealing with it is a legislative and not a judicial question.

Appellant admits that the evil of short weighing exists, he admits that the city has power to suppress it, and he does not deny that the ordinance in question is designed, and directly tends, to suppress such evil. His sole complaint is that he thinks some other method of suppression would be better; he complains because he himself has created a situation where compliance with the ordinance causes him, he says, additional expense and he urges that the ordinance is therefore unreasonable on the sole ground of causing such additional expense—an expense due solely, if it exists, to the method of delivery he has himself chosen to adopt.

He suggests that in lieu of the present ordinance, a different one should be enacted which would permit either (a) that the tare weight be determined once and for all in advance and stenciled on the vehicle, or (b) that the weighing be split into two operations so that the gross

weight might be obtained before, and the net and tare weights after delivery to the customer.

Neither suggestion is practical: The first presupposes that the tare weight remains constant, which it does not. The tare weight of a truck is made up of the truck itself and many other items including spare tires, tow chains, driver and helper, water, oil, gasoline, sideboards, dividing boards for split loads, wheelbarrows, and planks for runways on lawns; moreover the tare weight may be increased as much as 500 pounds by accumulated snow, ice, or mud on and under the fenders and running gear. The total possible variation in these items is over 2000 pounds. The items are all subject to frequent change according to the needs of the moment or the weather.

The second suggestion is equally objectionable; with an interval of time between the two weighings, a time during which the driver is not under the surveillance of the weighmaster, the opportunity for fraud by manipulating the items making up the tare weight, by introducing or removing spurious heavy objects, or even by the mere consumption of gasoline (twenty gallons weigh over 150 pounds), is obvious.

In any event appellant has raised a purely legislative question which the court will not decide as it is not concerned with whether or not the regulation is the best or most effective that could be employed, or with the wisdom, harshness, expediency, practicability, injustice, or policy of laws.

Appellant is not engaged in a new business but in the same business that others have been engaged in for years, the retail delivery of coal by truck; appellant offers no evidence to show that he will henceforth be unable to obtain coal from the mines for delivery or what proportion of

his deliveries coal constitutes or that he will be unable to compete with other truckers or dealers under this ordinance.

The question here is really only one of transportation.

III.

The ordinance does not violate Section 1 of the Fourteenth Amendment to the Federal Constitution.

This court will accept the decision of the Supreme Court of Illinois as to the construction of the ordinance, as to the power of appellee to enact it, and as to the findings of fact such as that the sale of the coal took place in Chicago and that appellant was the agent of the seller.

The ordinance is a valid exercise of the police power; this court has several times upheld similar legislation regulating weights and measures and public weighing.

The ordinance operates equally upon all who are subject to it.

A review of the decisions of State courts shows that the power of the State or its agencies to protect the buyer from shortweighing by compulsory weighing on public or on licensed scales has been sustained in every instance; the only occasions on which such statutes or ordinances have been held invalid have been the result of some particular objectionable feature unconnected with the theory and principle of such legislation.

The extravagant contention that enforcement of the ordinance will destroy appellant's business is without support in the record; appellant has adduced no evidence that his trucking business will be injuriously affected by such enforcement.

If the ordinance were not enforceable against appellant then the purchaser would have no protection. The mine. owner not only disclaims responsibility for appellant but is beyond the city's reach.

The cases cited by appellant present entirely different situations and are not controlling.

As the ordinance stands it does not discriminate for or against nonresidents; to recognize the demand of appellant would be to discriminate against the local truckmen and dealers in Chicago in favor of nonresidents.

It is of greater importance to the consumer to get full weight than to get cheap coal; the cheap coal would cease to be cheap if its weight were short.

In conclusion, the ordinance is not so unmistakably and palpably in excess of legislative power as to be void under the Fourteenth Amendment.

ARGUMENT

I.

The provisions of the ordinance, its history, and the purpose sought to be accomplished by it.

The ordinance under consideration was enacted pursuant to express grants of authority conferred by the legislature of Illinois in and by Sections 54, 55, 56, 66, 91 and 102 of Article V, Chapter 24, Illinois Revised Statutes. It provides *inter alia,* for the creation of an executive branch of the city government to be known as the Department of Weights and Measures (R. 27), for the appointment of a head of the department (R. 28), for the appointment of public weighmasters and their bonding (R. 38), and covers the matters of scales, charges for weighing and the issuance of weight certificates. (R. 39, 40) Section 2947 relates to commodities sold in load lots and delivered by truck and provides that all such loads shall be weighed by a public weighmaster whose certificate of weight shall be delivered to the purchaser before the vehicle is unloaded. (R. 29)

Section 3623, entitled "Weight certificates" provides that in no case shall any public weighmaster state in his certificate the tare weight of any vehicle until after he shall have weighed the vehicle in such manner as to secure the weight as specified.

The only real protection which Chicago purchasers of truck load lots of coal and other similar bulky commodities sold in load lots by weight have against the evil of short weighing and the use of padded weight tickets is afforded by this ordinance now before the court. It is true that there are ordinances and state statutes in force in Chi-

cago which make short weighing an offense and penalize it. Yet of what avail are such ordinances and statutes when there are no means of detecting the short weigher or of securing evidence that will lead to his conviction or of preventing him from continuing his nefarious practices? As the Supreme Court of Illinois said in the case of *City of Chicago* v. *Wisconsin Lime & Cement Co.* (1924), 312 Ill. 520, 522, 144 N. E. 3, speaking of the state statute making sale by false weights or measures a criminal offense:

> "Purchasers of a commodity by weight already had that protection but no way to enforce it. In buying ordinary articles the buyer generally may see the article weighed or have the means at hand to ascertain whether it is short weight, but when applied to load lots it was and is impossible for the purchaser to determine the weight of the load. The purpose of the ordinance was most commendable and essential to secure to the purchaser the weight of the commodity purchased and paid for."

No such protection is afforded by the statutory law of Illinois as Illinois has no public weighmaster statute. That the coal delivered by Burgess through his trucker, appellant Hauge, was weighed on state-inspected scales at Morris, Illinois, means very little. The coal was not weighed by a public weighmaster or sold or delivered with any public weighmaster's weight certificate.

The Supreme Court of Illinois in the case at bar held (R. 48):

> "It is immaterial to the issues here that the coal in question was weighed outside of the City of Chicago on state-tested scales. The Weights and Measures act does not repeal, supersede or to any extent modify the right of a municipality to adopt an ordinance regu-

lating the method of ascertaining the correctness of weights and measures."

Neither does the Illinois Weights and Measures act, as contended by appellant, furnish adequate safeguards to the Chicago purchaser of coal against short weights. The requirement of the state statute that a delivery ticket showing gross, tare and net weight be surrendered upon demand to any city inspector of weights and measures for his inspection and be delivered to the purchaser at the time of delivery, does not afford adequate protection. The Illinois statute does not require the delivery of any ticket before unloading the coal. It simply says that a delivery ticket shall be delivered at the time of delivery, which might be before the truck leaves the customer's premises but after the coal is stored away in a bin in the customer's basement or dumped on the ground. Likewise the exhibiting of a delivery ticket to a city inspector after the coal had been dumped or stored away would not enable the inspector to weigh the coal in its original condition. One of the most common practices of dishonest coal dealers which was prevalent in Chicago before the enactment of this ordinance was that of using two delivery tickets. For example, a purchaser who had ordered five tons would be sent a load containing four and one-half tons. If the driver were intercepted by a city inspector he would produce a delivery ticket for the true weight of the coal carried and explain to the customer that his truck was old or its springs weak and that he would be back again with the extra half ton. If he got through and made the delivery to the purchaser without interference, he would deliver the padded or false ticket showing a net weight of five tons, and the customer would be defrauded out of a half ton of coal. It will, therefore, be seen that in order to cope successfully with the device of double tickets it is necessary

that the driver be required to deliver a certificate of true weight issued by a bonded official who might lose his license and forfeit his bond if he issued a false certificate.

Another difficulty which confronts the city and shows that the ordinance under consideration in the case at bar is indispensable is this: In the case of *City of Chicago* v. *Kautz*, (1924), 313 Ill. 196, 144 N. E. 805, the Supreme Court of Illinois came to the surprising conclusion that the city inspectors had no power to require the re-weighing of a load of coal en route to a customer, which coal, had once been weighed by a public weighmaster, and that Section 986 of the Chicago Municipal Code of 1922, which purported to give such power, was invalid. Section 986 became Section 3342 of the Revised Chicago Code of 1931, which appellant, on page 9 of his brief, relies upon to convince this court that Section 2947 is not necessary. The opinion of the Illinois Supreme Court in the *Kautz* case (p. 203) makes it clear that that court in reaching the conclusion it did, assumed that the public in Chicago is protected by the ordinance now before this court in the case at bar, and virtually finds that the protection given by that ordinance makes the protection afforded by Section 986 superfluous. As a matter of fact, in view of the conclusion of the Illinois court in the *Kautz* case, the protection afforded by the ordinance now being considered has become not merely desirable but absolutely necessary and indispensable if the buying public in Chicago is to be safeguarded from the notoriously prevalent and well-organized swindling by habitual short weighers in the coal and building material businesses. If this ordinance should be held unconstitutional there will be nothing left in so far as truckers like Hauge are concerned but an empty prohibition of short weighing and a meaningless penalty.

This, we believe, demonstrates the necessity of the ordinance and fully answers appellant's contention that the ordinance is unnecessary, and therefore unconstitutional because it is unnecessary. If it does not, we then make the further point that the municipal legislative body and not appellant, and not even the courts, is the judge of the necessity for regulation. This court has repeatedly held that the legislature may select the means which it deems to be appropriate to the end to be achieved. The cases on this point will be found cited under Point II of this brief. So we contend that if in the judgment of the City Council of the City of Chicago, in order to cope with the practices of short weighing of bulky commodities sold in truck load lots by weight, it is necessary to establish public weighmasters and prescribe the use of public weighmasters' certificates of weight, and also to require the weighing of the vehicle empty as well as the gross load, in order to arrive at the true net weights, appellant is not in a position to defeat the ordinance upon the ground that in his judgment some other regulation should have been adopted. Neither is he in a position to ask this court to substitute its judgment for that of the municipal legislative body.

Prior to the enactment of this ordinance conditions in the City of Chicago in regard to short weighing and the use of padded weight tickets had become so bad that the coal dealers themselves had asked for protection from the city. The conditions were such that either the dealers must get some protection or else resort to the same dishonest practices that their competitors were using or else go out of business. Repeated cheating was going on. So the ordinance was passed in 1922 and became effective in 1923 to remedy the condition by prescribing that load lots shall be weighed on public weighmasters' scales and delivered with public weighmasters' weight certificates, thus making

the weigher personally responsible under his bond and subject to the revocation of his license for dishonesty in weights. This historical background of the ordinance was brought out in the case of *City of Chicago* v. *Wisconsin Lime & Cement Co.* (1924), 312 Ill. 520, 144 N. E. 3, 270 U. S. 626. On page 521 of its opinion the Supreme Court of Illinois said:

> "The ordinance was designed to protect the purchasing public against what has been universally regarded as a widespread evil in the selling of commodities in load lots by weight and it contained effective means for the prevention of the evil. It was proved at the trial that the conditions in Chicago in regard to short weighing, the use of padded weight tickets, the substitution of a different kind of coal from the coal billed, and the mixing of an inferior grade with coal of a superior grade and quality, had become so bad that many reputable dealers had asked protection from such unfair competition."

The ordinance is confined in express terms to commodities sold in load lots by weight and delivered in the city. It is directed at such commodities as coal and similar articles sold in load lots which, by reason of their bulky nature, offer unusual opportunity for fraud and imposition upon the purchaser.

The method of protection provided in the ordinance is fundamentally the regulation of the weighing of bulky commodities by a system of licensing. It establishes a licensed public weighmaster who is bonded and whose license is subject to revocation by the Mayor. Any resident of the city may become a public weighmaster and the fact that such resident is a coal dealer does not preclude him or his employee from qualifying as a public weighmaster and from maintaining public scales in his yard for his convenience

in complying with the ordinance. It furnishes protection to the purchaser by provisions which necessarily tend to bring about honest weighing, also by providing means for detecting not only the short-weighter but also the person who defrauds the purchaser by substitution of inferior for superior grades. The requirement as to the delivery to the purchaser of a public weighmaster's weight certificate at the time the delivery is made and the coal paid for by the customer is most essential. In estimating the protection afforded the purchaser by this certificate it should be kept in mind that outwardly there is never anything suspicious about a load of coal or other bulky commodity so as to attract the attention or arouse the curiosity of a law-enforcing official. In the case of small articles sold over the counter the sense of weight or of touch frequently furnishes a sufficient basis for the suspicion of short weight. At any rate the weights can be easily verified on other scales. It is not so with a load of coal. There is nothing suspicious about a ten-ton truck which is only half full; the dealer may be filling a legitimate five-ton order or he may be delivering the first five tons on a fifteen-ton order. It is only when he or his trucker delivering the coal is required to have some authoritative certificate purporting to describe the load and to furnish the basis on which it is billed that it is possible to detect fraud. But even this is not enough. In order to cope successfully with the device of double tickets—one of which represents the correct weight, and the other, a padded weight, to be used as the occasion requires—it is necessary that the trucker be required to deliver his weight certificate to the purchaser at the time of delivery and before unloading the coal.

In this case the Supreme Court of Illinois said (R. 49):

> "The opportunity to defraud the consumer in the sale of coal in load lots is great and the consumer has

no adequate way to protect himself against being cheated. The delivery of true weights of coal to the consumer is a matter clearly related to the public welfare and the city has the right to adopt reasonable ordinances therefor."

The foregoing is, we believe, sufficient to demonstrate that the ordinance which appellant seeks to break down is a salutary measure, that its purpose and necessary effect is to furnish buyers with a much needed protection from imposition and fraud by short weights in bulky commodities and incidentally to protect honest dealers from unfair competition.

II.

There is no justiciable controversy involved in this case. The existence of the evil of short weighing being admitted, the method of dealing with it is a legislative and not a judicial question.

Appellant concedes that the delivery of short weights of coal constitutes a fraud upon the purchaser and is an evil which should be suppressed. He admits that the city has power to adopt measures which are directed toward the suppression of such evil and he does not, indeed he cannot, deny that the ordinance here involved is in fact directed at such suppression and that it does in fact reasonably tend to accomplish its purpose.

Nowhere does appellant charge or show that the ordinance is in and of itself discriminatory or that it singles out certain members of the same class for special treatment; he does not even claim that the manner in which it is administered is discriminatory. Appellant simply contends that he has a right to conduct his business in any manner which is agreeable to him and that since, out of

several other methods of conducting it, he has chosen one which, in combination with the ordinance, entails upon him a small additional expense, therefore the ordinance is unreasonable and oppressive. But the alleged hardship does not arise out of the ordinance or its administration, but out of a situation of his own devising.

It cannot be too strongly emphasized that appellant is not quarreling with the power to enact the ordinance; he is not quarreling with the manner of its administration; and he is not claiming that it is unsuited to its purpose. All he claims is that the ordinance should be redrafted and the method of enforcement changed so that his deliveries will be more convenient and slightly less expensive. As pointed out by Mr. Justice Herrick, in the opinion of the Supreme Court of Illinois in this case, the appellant, far from being discriminated against, is himself asking for special treatment (R. 50). Appellant contends that even though the ordinance is satisfactory to everybody else, yet if it makes his deliveries more expensive than it would if it were drafted differently, then it is unreasonable and void unless and until it is changed to suit his particular business.

Appellant's entire case rests upon the following suspicious syllogism: 1. The ordinance, in its practical operation in this particular case, requires the unloading and reloading of the truck during the course of delivery thereby increasing slightly the ultimate cost to the consumer. 2. The ordinance would be equally effective to accomplish its avowed purpose were it to permit either (a) that the tare weight be determined once and for all in advance and stenciled on the vehicle, or (b) that the weighing be split into two operations so that the gross weight might be obtained before and the net and tare weights after delivery to the customer, thereby avoiding such alleged increase in

ultimate cost. 3. Since the legislative body which enacted the ordinance did not adopt the method the least burdensome to appellant or the best or most effective means, in the opinion of the appellant, for accomplishing its purpose, the ordinance is unreasonable and void although concededly enacted in pursuance of the legitimate exercise of the legislative power vested in that body.

Propositions one and two lie in mere statement and have not been proved; but even were they true, proposition three is a *non sequitur* and is not the law.

As to proposition one, the only reason appellant would be required to unload and reload his truck is because he insists on loading the truck before the weighing which is his own choice not that of the ordinance.

As to proposition two, a moment's consideration will readily demonstrate that a stenciling of the tare weight on the vehicle is utterly impractical and that a weighing split into two operations, with an interval of time in between during which the trucker is not under the observation of the weighmaster, is neither practical nor nearly as effective to prevent fraud as the single operation envisaged by the ordinance.

The impractical suggestion that the tare weight be stenciled on the vehicle in advance assumes that the tare weight of a truck will stay constant, when, as a matter of fact, modern trucks shift their equipment to meet their hauling needs and each shift in equipment will change the tare weight. For instance, mine truckers commonly haul five tons of coal to Chicago customers by equipping the body of the truck with high sideboards of heavy planks, which increase the tare weight by approximately 350 pounds, but the same trucker the following day, may haul a three-ton order, which does not necessitate the use of sideboards and they are, therefore, naturally left off.

It may fairly be assumed that two spare tires weigh 100 pounds each, that they are often carried but are sometimes left off for repairs, and that one may be left off and the other carried, making a change of 100 to 200 pounds in the tare weight. It may also be assumed that tow chains weighing approximately 80 pounds are sometimes carried and sometimes not. A truck in slushy weather may pick up partially melted snow with its tires and throw this under the fenders and running gear, where it often freezes instantly, because of the velocity of the truck against a strong cold wind, and a change of 500 pounds in tare weight is quite common under these conditions. Considerable change also occurs in rainy weather, particularly if the truck is driven over mud roads.

Tare weight of a truck, then, is made up of the truck itself and many other individual items, including spare tires, tow chains, driver and helper, gasoline, sideboards, dividing boards for split loads, wheelbarrows, and planks for runways on lawns. Much of this tare weight is flexible and subject to frequent change, a fact which makes the stenciling of a constant tare weight on the side of a truck impractical.

The method proposed by appellant would permit the return of the common frauds which prevailed before the passage of Section 2947. For example a truck driver knows that the easiest way to perpetrate a fraud and the most unlikely to be discovered, is the juggling of the tare weights. Moreover, the driver knows that he can give plausible excuses if shortweight is discovered, due to a change in tare weight. As an excuse he will allege a mistake or oversight on his part in forgetting that he had made a change in the tare weight by eliminating or adding some of the equipment.

The other method suggested by appellant—that only the gross weight be obtained before delivery and that the net weight be ascertained after delivery—is equally objectionable. This would obviously open the door to various fraudulent devices. Assume that the tare weight of a truck and its equipment when it arrives at the scales is 9000 pounds and that it contains 9000 pounds of coal. Assume that only the gross weight—18,000 pounds—is taken. The trucker then drives away, makes his delivery, and returns to the scale for a tare weight but, in the meantime, has removed from the vehicle two spare tires (200 pounds), the tow chains (80 pounds), the sideboards (350 pounds), the dividing boards (300 pounds), and has consumed ten gallons of gasoline (80 pounds), or a total weight of 1010 pounds. The weighmaster weighs for the tare weight and records: Gross weight, 18,000; tare weight 7990; net weight 10,010 pounds. The certificate will show a delivery of five tons whereas the purchaser in fact received only four and one-half tons and was shortweighted one-half ton.

Or suppose that a trucker places spurious heavy objects in the bottom of the truck covering them up with sacks of coal; having obtained a high gross weight certificate, he would then deliver the coal, remove the spurious objects, and obtain a low tare weight certificate; he could thus show a high net weight delivery which would in fact be false. This type of fraud would be difficult and improbable where all the weights (gross, tare, and net) were obtained in one operation. Or, again, suppose a truck with a water capacity of five gallons, an oil capacity of five quarts, and a gasoline capacity of twenty gallons. A truck fully supplied with these materials would weigh over two hundred pounds more than a truck without them. These items could easliy be consumed, changed, or removed.

The City of Chicago does not claim that fraud is impossible under the ordinance as now drawn but it does claim that fraud is now much more difficult of accomplishment than it would be under the proposed ordinance which appellant seeks to have enacted by the courts.

Without Section 2947, if an inspector of the Department of Weights and Measures were to approach a driver who was delivering coal, and were to ask him how much coal he was delivering, the driver could easily state correctly the amount that was on the truck, even though the purchaser might declare that he had ordered one ton more than was being delivered, indicating that the driver intended to shortweight the purchaser. The driver's reply could easily be that his tires were getting old and weak, or his springs were weakening, and he could not carry the full amount ordered, so that an additional ton was to be brought on a second haul. The inspector could reweigh the load, but could not prove a shortweight case. The remedy for this condition was the passage of Section 2947.

There is another consideration affecting this problem: Since the owners declare that they deliver the coal to the trucker at the mine and have no further responsibility (R. 18) the only penalty that could be assessed for shortweighing would be against the trucker; he engages only intermittently in business in Chicago and his reputation would not be damaged by a shortweight conviction to the same extent as that of a Chicago dealer. The local Chicago dealer is dependent upon the confidence of his customers for his repeat business and can suffer greatly from a conviction for shortweighing. Therefore he is zealous to prevent inaccurate weighing.

However if appellee were wrong as to both the foregoing propositions and if it could be said that the ordinance pro-

posed by appellant would be equally or even more effective to prevent fraud, still it is not the law that the present ordinance is therefore invalid.

Appellant has raised a purely legislative question which the courts will not decide. His contention has been completely answered by this Court in *Booth* v. *Illinois,* (1902) 184 U. S. 425 at 429 and 431-432, a case involving an Illinois statute declaring illegal all options to sell or buy grain at a future time. Mr. Justice Harlan, delivering the opinion of the court, and answering the contention that the statute forbade a lawful calling along with the unlawful, said:

> Page 429. "A calling may not in itself be immoral, and yet the tendency of what is generally or ordinarily or often done in pursuing that calling may be towards that which is admittedly immoral or pernicious. If, looking at all the circumstances which attend, or which may ordinarily attend, the pursuit of a particular calling, the State thinks that certain admitted evils cannot be successfully reached unless that calling be actually prohibited, the courts cannot interfere, unless, looking through mere forms and at the substance of the matter, they can say that the statute enacted professedly to protect the public morals has no real or substantial relation to that object, but is a clear, unmistakable infringement of rights secured by the fundamental law * * *"
>
> Pages 431-432. "The statute here involved may be unwise. But an unwise enactment is not necessarily, for that reason, invalid. It may be, as suggested by counsel, that the steady, vigorous enforcement of this statute will materially interfere with the handling or moving of vast amounts of grain in the

West which are disposed of by contracts or arrangements made in the Board of Trade in Chicago. But those are suggestions for the consideration of the Illinois legislature. The courts have nothing to do with the mere policy of legislation."

Appellant's case is less strong than that presented to the court in the foregoing grain futures case. There is no interference with the movement of coal, there is no prohibition against moving coal into the city; appellant is simply required to conform to reasonable measures for the prevention of fraud. The only interference appellant can show is with his particular method of doing business, not with the business itself. Under the law of the case cited, appellant's method of doing business could be prohibited altogether if that were necessary for the prevention of fraud.

In *Burroughs and Cannon* v. *United States,* (1934) 290 U. S. 534 at 547-548, this Court, in upholding the Federal Corrupt Practices Act, said through Mr. Justice Sutherland:

> "*The power* of Congress to protect the election of President and Vice President from corruption *being clear, the choice of means to that end presents a question primarily addressed to the judgment of Congress.* If it can be seen that the means adopted are really calculated to attain the end, the degree of their necessity, the extent to which they conduce to the end, the closeness of the relationship between the means adopted and the end to be attained, are matters for congressional determination alone." (Italics supplied.)

In *Champion* v. *Ames* (*Lottery Case*), (1903) 188 U. S. 321, 353, Mr. Justice Harlan, delivering the opinion of

the court upholding federal legislation prohibiting the carriage of lottery tickets in interstate commerce, said:

> "In determining the character of the regulations to be adopted Congress has a large discretion which is not to be controlled by the courts, simply because, in their opinion, *such regulations may not be the best or most effective that could be employed.*". (Italics supplied.)

To the same effect: *Metropolis Theatre Co.* v. *Chicago,* (1913) 228 U. S. 61, 69; *Atlantic Coast Line Railroad Company* v. *Georgia,* (1914) 234 U. S. 280 at 287-288.

A North Dakota statute required that all lard not sold in bulk be sold in containers holding a specified number of pounds or multiples thereof and forbade fractional numbers. Armour & Company was convicted and fined for selling a container of lard holding more than two and less than three pounds. This statute was attacked as putting an unreasonable, unnecessary burden on the company and causing additional expense. In *Armour & Company* v. *North Dakota,* (1916) 240 U. S. 510, this Court upheld the law and said (Mr. Justice McKenna, at page 513):

> "Nor do the courts have to be sure of the precise reasons for the legislation or certainly know them or be convinced of the wisdom or adequacy of the laws."

In *Rast etc.* v. *Van Deman & Lewis Company,* (1916) 240 U. S. 342, a case involving a Florida license tax on merchants using profit sharing coupons and trading stamps, this court, upholding the statute and quoting with approval from an earlier case, said (Mr. Justice McKenna, at page 366):

> "It by no means is true that every law is void which may seem to the judges who pass upon it excessive,

unsuited to its ostensible end, or based upon conceptions of morality with which they disagree."

The harshness of legislation, or the hardship it may cause, afford no reason for considering it to be unconstitutional: Mr. Chief Justice Hughes in *Norman* v. *Baltiment & Ohio Railroad Co.*, (1935) 294 U. S. 240, 306. In accord: *Powell* v. *Pennsylvania*, (1888) 127 U. S. 678, 686; *Missouri Pacific Railway Company* v. *Humes*, (1885) 115 U. S. 512, 520, quoted with approval in *New York & New England R. R. Co.* v. *Bristol*, (1894) 151 U. S. 556, 570; *Barbier* v. *Connolly*, (1885) 113 U. S. 27, 32; *Twining* v. *New Jersey*, (1908) 211 U. S. 78, 106, *Schmidinger* v. *Chicago*, (1913) 226 U. S. 578, 588.

With the wisdom of the policy adopted, with the adequacy or practicability of the law enacted to forward it, the courts are both incompetent and unauthorized to deal: Mr. Justice Roberts in *Nebbia* v. *New York*, (1934) 291 U. S. 502, 537, (upholding a New York statute and the regulations issued thereunder fixing the prices at which milk could be sold). In accord: *Home Building & Loan Association* v. *Blaisdell et al.*, (1934) 290 U. S. 398, at 447-448; *Green et al.* v. *Frazier etc. et al.*, (1920) 253 U. S. 233, 240; *Hamilton etc.* v. *Kentucky Distilleries & Warehouse Co.*, (1919) 251 U. S. 146, at 161-162; *Brushaber* v. *Union Pacific Railroad Company*, (1916) 240 U. S. 1, 25; *Waugh* v. *Board of Trustees of the University of Mississippi*, (1915) 237 U. S. 589, 597; *Fox* v. *Washington*, (1915) 236 U. S. 273, 278; *German Alliance Insurance Co.* v. *Lewis etc. of Kansas*, (1914) 233 U. S. 389, 417; *Brodnax* v. *Missouri*, (1911) 219 U. S. 285, 293; *McCray* v. *United States*, (1904) 195 U. S. 27, 54.

Appellant, on page 21 of his brief, contends that the requirement that the tare weight be officially determined

prior to delivery is inferentially recognized as unreasonable by the Chicago City Council itself, because under all other sections of the ordinance dealing with the verification of a tare weight after the commodity is loaded such tare weight may be determined after the delivery of the load to the purchaser; and he cites Sections 2939, 2950, 2951, 3342 and 3445 (R. 28, 29, 30, 33, 37). It seems hardly necessary to state that the situation covered by Section 2947 (the one here involved) and the situation covered by the other sections cited by appellant are totally different and should be treated differently. In passing, it may be noted that the purpose of the sections cited by appellant is not, as stated by him, to verify the tare weight, but to verify the net weight; that in the situation covered by the sections cited, the vehicle and load have already been separately weighed by a bonded weighmaster and the driver is already in possession of the weighmaster's certificate showing the tare, gross and net weights; and that it may reasonably be presumed that such certificate of a bonded weighmaster was correct at the time it was given. The purpose of the additional sections cited by appellant is to discover any short weight which may have been effectuated *after* the giving of the certificate. When a city inspector picks up a truck in the course of delivery it remains under his constant supervision during the obtaining of the gross weight, during the delivery to the customer, and during the obtaining of the net weight. It is therefore immaterial in what order the different weights are obtained as the inspector's continued presence prevents the accomplishment of any further fraud. Since the truck is already loaded when he finds it and since it remains under his surveillance thereafter, it is reasonable for the ordinance to permit delivery before checking the net weight. Since further fraud is, at this point, impos-

sible, a dumping to obtain the tare weight and a reloading for delivery are unnecessary.

Section 2947 (R. 29), which is the section appellant attacks envisages a totally different situation. Here, for the proper prevention of fraud, the tare, gross, and net weights must be determined together. As already pointed out, if a driver were permitted to obtain the different weights at separate times, with an interval during which he is under no one's surveillance, he would have an opportunity to impose upon the weighmaster in a manner not at present possible. Under the existing system, where all the weights are obtained at one time under the weighmaster's uninterrupted supervision, the weighmaster's certificate is impeccable and it is impossible for him unknowingly to give a certificate which shows a false net weight. Short weights may be effectuated *after* the certificate is given and it is *here* that the other sections come in; their purpose is to prevent fraud *after* the certificate has been obtained and during the process of delivery. The purpose of Section 2947 is to provide for a reliable and authentic weight certificate prior thereto, a wholly different matter requiring a different rule. Clearly there is no inference that because the city enacted other sections applying to a different situation, it thereby admitted that Section 2947 is unreasonable.

Appellant also contends (Appellant's Brief, pages 27 and 28 *et seq.*) that he is engaged in a different business from that of the other coal dealers. It is obviously the same business—the retail delivery of coal—pursued in a different manner. To say that the use of trucks instead, for example, of freight cars, changes the retail coal business into some other business (to which appellant gives no name) is specious. Appellant claims that trucking coal is a new business; this Court may well take judicial notice of the

fact that coal has been delivered by truck for a great many years. Appellant claims that if the ordinance is enforced and the cost of coal delivered by him is increased fifty cents to a dollar a ton, his business will be destroyed. Presumably he means that the coal mines will stop using trucks in favor of railroads or otherwise deprive him of business. There is not a particle of evidence to support such a conclusion; there is no evidence that coal is the only commodity he trucks or even that coal deliveries constitute a large proportion of his business; nor is there any evidence that the increase in cost claimed by appellant to result from the ordinance, will disable him from competing with other coal dealers or raise the ultimate price of his coal above that of competing coal. Appellant may be a mere laggard in the race. In *Hegeman Farms Corporation* v. *Baldwin et al.*, (1934) 293 U. S. 163, 170, 171, Mr. Justice Cardozo, delivering the opinion of the court, said:

> "The Fourteenth Amendment does not protect a business against the hazards of competition. . . . .
>
> ". . . . . True, of course, it is that the weaker members of the group (the marginal operators or even others above the margin) may find themselves unable to keep pace with the stronger, but it is their comparative inefficiency, not tyrannical compulsion, that makes them laggards in the race. Whether a wise statecraft will favor or condemn this exaltation of the strong is a matter of legislative policy with which courts are not concerned."

Appellant's claim that his business will be seriously affected, to say nothing of destroyed, is absolutely unsupported by the record.

The Supreme Court of Illinois correctly perceived the gist of appellant's case when it said that the question here is really only one of transportation. The court said through Mr. Justice Herrick (R. 50, 52):

> *"The circumstance that has brought about the controversy here is, after all, one of transportation. . . . .*
> " . . . . . There is no discrimination made by the ordinance against the defendants. *They have merely elected to do their business in a manner more convenient to them* and different from the method prescribed by the ordinance. . . . ." (Italics supplied.)

The foregoing indicates a clear perception on the part of the Supreme Court of Illinois that this case raises no justiciable question and that appellant's attack on the ordinance goes only to its wisdom, expediency, or justness, matters lying in the sole discretion of the legislative body. It is respectfully submitted that under the law laid down in the cases cited above the decision of the Supreme Court of Illinois is correct and should be affirmed.

III.

The ordinance does not violate Section 1 of the Fourteenth Amendment to the Federal Constitution.

Under this point we shall show that the ordinance does not deny to appellant the equal protection of the laws or deprive him of liberty or property without due process of law in violation of section 1 of the Fourteenth Amendment.

Of course, so far as a hearing upon the merits of this appeal is concerned, this court accepts the decision of the Illinois Supreme Court based on local law not involving Federal Constitutional questions as not being review-

able in this court. *Hibben* v. *Smith,* (1903), 191 U. S. 310; *Campbell* v. *Olney,* (1923), 262 U. S. 352. The question whether the ordinance conflicts with the Constitution of Illinois has been settled by the decision of the Supreme Court of Illinois holding that it does not. *Carstairs* v. *Coebron,* (1904), 193 U. S. 10; *Louisville Gas & Electric Co.* v. *Coleman,* (1928), 277 U. S. 32. The highest court of Illinois has determined that the appellee city has the power to adopt the ordinance and that the acts of appellant amount to a violation thereof, and this determination is not therefore within the scope of the review by this court. *Fischer* v. *St. Louis,* (1904), 194 U. S. 361; *City of Chicago* v. *Waters,* 363 Ill. 125, 1 N. E. (2d) 396, R. 45. So also, the construction of the ordinance by the highest court of Illinois must be accepted by this court when testing the validity of the ordinance under the Federal Constitution. *Wong Ham Wah Co.* v. *Industrial Commission,* (1921), 255 U. S. 445. The Supreme Court of Illinois has held that the sale of the coal took place in Chicago and that Hauge was the agent of the seller of the coal. *City of Chicago v. Waters,* 363 Ill. 125, 129, 1 N. E. (2d) 396, R. 45.

The merits of this appeal, therefore, present for review only the question whether the ordinance is violative of section 1 of the Fourteenth Amendment to the Constitution of the United States:

The ordinance is a valid exercise of the police power.

Laws and ordinances of the character of the one here under consideration have been considered lawful exercises of the police power and free from successful attack on the ground of violating the Fourteenth Amendment.

The inhibition upon the deprivation of property without due process of law is not violated by the legitimate use of the legislative power of a State or a municipality in

securing the public safety, health, morals, general welfare or general prosperity. *New York etc. R. Co.* v. *Bristol,* (1894), 151 U. S. 556, 567. *Chicago etc. R. Co.* v. *Illinois,* (1906), 200 U. S. 561.

In *Merchants Exchange* v. *Missouri,* (1919), 248 U. S. 365, a State law which forbade, under penalties, any person other than a duly authorized and bonded State weigher to issue any weight certificate for grain weighed at any warehouse or elevator where State weighers were stationed, or to charge for such weighing or certificates, was upheld against attack on the ground that it was inconsistent with the due process and equal protection clauses of the Fourteenth Amendment, as applied to a local board of trade which weighed grain and issued weight certificates, for a charge, at the request of its members.

In *House* v. *Mayes,* (1911), 219 U. S. 270, this Court held that a State might require the sale and delivery of a commodity to be by actual weight and might prohibit arbitrary deductions under rules of associations, without depriving the members of such associations of their liberty of contract or of their property without due process of law.

In *McLean* v. *Arkansas,* (1909), 211 U. S. 539, was upheld the validity of an act to provide for the weighing of coal as it comes from the mine and before it passed over a screen. The court held that, while the police power is subject to judicial review, liberty of contract guaranteed by the Fourteenth Amendment is not universal, but is subject to legislative restrictions, and that the legislature of a State is primarily the judge of the necessity of exercising the police power and courts will only interfere in case the act exceeds legislative authority. The fact that the court doubts its wisdom or propriety affords no grounds for declaring a State law unconstitutional or invalid.

In *Pittsburgh, etc., Coal Co.* v. *Louisiana,* (1895), 156 U. S. 590, this Court upheld, against attack on the ground that it worked an unconstitutional discrimination, an act which provided for the appointment of coal and coke boat gaugers and making it compulsory upon all persons selling coal or coke in a barge to have the same inspected and gauged according to the provisions of the act. The opinion delivered by Mr. Justice Field states (p. 600):

> "Nor is there any discrimination in the transportation of the coal and coke from Alabama and that from Pennsylvania, as in any respect impairs the efficiency of the laws of Louisiana. The difference between the transportation of the coal and coke from Pennsylvania and from Alabama is only the difference arising from one being transported by water and the other by land. There is a difference arising between water and land carriage, arising from the nature of the two modes, but not one created by legislation, direct or indirect, or by any efforts of the state legislature to give or recognize a discrimination in the case of either."

Mr. Justice Herrick of the State Court was therefore right when he said in the case at bar:

> "The circumstance that has brought about the controversy here is, after all, one of transportation."

While there may be a difference in the method of transacting business between resident Chicago coal dealers and nonresident truckers of coal from downstate mines, it is not one created by Chicago's ordinance or by any efforts of the City Council to give or recognize a discrimination in the case of either. The ordinance operates equally upon all those selling and delivering load lots of coal, by weight, within the city. It is thought that the *Pittsburgh, etc. Coal Co.* case is controlling upon the case at bar.

In *Cotting* v. *Kansas City Stock Yards Co.*, (1901), 183 U. S. 79, with reference to the equal protection clause, this Court said (p. 110):

> "That constitutional provision does not, it is true, invalidate legislation on the mere ground of inequality in actual result."

See also *Merchants Bank* v. *Pennsylvania,* (1897), 167 U. S. 461, 463; *Jeffery Mfg. Co.* v. *Blagg,* (1915), 235 U. S. 571, 577.

Appellant Hauge is in the same relation to the purpose of the ordinance that Chicago coal dealers are in, and this Court in *Ohio* v. *Dollison,* (1904), 194 U. S. 445, 447, held that an objection that a statute denies equal protection can only be sustained if it treat one party differently from what it does others who are in the same relation to the purpose of the statute.

In the case of *Schmidinger* v. *City of Chicago,* (1913), 226 U. S. 578, the validity of Chicago's ordinance prescribing standard sizes of loaves of bread and prohibiting the sale of other sizes was attacked, on the ground that it violated the due process of law, the freedom of contract and the equal protection clauses of the Fourteenth Amendment. In affirming the judgment of the Supreme Court of Illinois, this Court held that there was no absolute liberty of contract; that limitations thereon by police regulations of a city are frequently necessary in the interest of public welfare and do not violate the freedom of contract guaranteed by the Fourteenth Amendment.

Gundling v. *City of Chicago,* (1900), 177 U. S. 183, involved the validity of Chicago's cigarette license ordinance. In holding that the enactment of the ordinance violated no provisions of the Federal Constitution, this Court said (p. 188):

> "Regulations respecting the pursuit of a lawful trade or business are of very frequent occurrence in the various cities of the country, and what such regulations shall be or to what particular trade, business or occupation they shall apply, are questions for the State to determine, and their determination comes within the proper exercise of the police power by the State, and unless the regulations are so utterly unreasonable and extravagant in their nature and purpose that the property and personal rights of the citizen are unnecessarily, and in a manner wholly arbitrary, interfered with or destroyed without due process of law, they do not extend beyond the power of the State to pass, and they form no subject for Federal interference."

Statutes and ordinances such as the one before the Court which seek to protect buyers by requiring that certain commodities be weighed upon public (or licensed) scales, by public (or licensed) weighers, are common and have regularly and generally been upheld as valid police regulations. Note in 51 L. R. A. (N. S.) 731.

> "Legislation of this character, as for instance where it requires commodities to be weighed by the public weigher, is regarded as within the police power of the state, and as not violating any common right." Ruling Case Law, Vol. 28, Chap. on "Weights and Measures," Par. 5, p. 5.

See also Ann. Cas. 1912-C, pp. 255, 256; Ann. Cas. 1918-D, p. 159; Dillon on Municipal Corporations, 5th ed., Sec. 710; Freund on Police Power, Secs. 273-275; McMillan on Municipal Ordinances, Sec. 485.

ARKANSAS: In *Taylor* v. *Pine Bluff*, (1879), 34 Ark. 603, the Supreme Court of Arkansas held that the munici-

pality had power to require parties selling coal in the city to weigh the coal on scales provided by the city and to pay a reasonable fee for the weighing, but that the particular ordinance was void because the fees were intended for revenue purposes and not regulation only. In *Wills* v. *City of Fort Smith,* (1902), 70 Ark. 221, 66 S. W. 922, the Court sustained the validity of an ordinance of the City of Fort Smith making it unlawful for any person thereafter to sell any coal in the city without first weighing it upon the city's scales and paying the weighmaster a fee for the weighing of each load. In *Petty* v. *State,* (1912), 102 Ark. 170, 143 S. W. 1067, the Court upheld a statute of the State of Arkansas providing for the election of county cotton weighers and prohibiting any person other than the county weigher or his deputy from weighing any cotton sold in the town or village where the cotton weigher kept his scales.

CALIFORNIA: A note in Ann. Cas. 1918-D, page 160, cites *Scott* v. *Boyle,* (1912), 164 Cal. 321, 128 Pac. 941 (involving an ordinance of the City of San Francisco), and *Milliken* v. *Meyers,* (1914), 25 Cal. App. 510, 144 Pac. 321, (involving an ordinance of the City of Los Angeles), for the proposition that "legislation which requires the weighing and measuring of certain bulky commodities by public officers appointed for the purpose has been held to be a reasonable exercise of the police power." Both cases, however, involved the right of city sealers to salary, and while the ordinances were both upheld, neither of them, so far as appears from the opinions, provided for compulsory weighing by public weighmasters.

GEORGIA: In *City of Cartersville* v. *McGinnis et al.,* (1914), 142 Ga. 71, 82 S. E. 487, the Supreme Court of Georgia held an ordinance invalid because of a section making the decision of a public weigher determinative

of the weights as between the buyer and seller. As to all other contentions made against the ordinance, however, the Court sustained its validity. The ordinance required that all cotton, hay, grain, produce or other articles sold in bulk from wagons or other vehicles be weighed by the public weigher before sold, the public weigher to make out a certificate and collect a fee for each weighing. In *Austin et al.* v. *Atlanta,* (1922), 28 Ga. App. 702, 113 S. E. 113, (certiorari denied by Supreme Court of Georgia) the court upheld a municipal weighing ordinance under the following circumstances. One Austin and the Standard Coal Company were charged with selling coal without weighing it and without furnishing a written statement of weight, in violation of the ordinance. The evidence showed that the coal, under an express contract between the seller and the purchaser, was not to be sold by weight but by measure. Although the coal was sold as "two tons" at a stated price per ton it was sold by a two-ton truck or wagon load for the purpose of saving expense and enabling purchasers to obtain coal at a lower price than the prevailing prices. A car load of coal had been weighed and was divided among purchasers named on a list in proportions of one or more tons without reweighing. The same contention was made there as is being made by appellant in the case at bar, that is, that the purpose of the transaction was to enable purchasers to obtain cheap coal. The court held, however, that the ordinance expressly required that the coal be weighed and that under it all coal must be weighed, regardless of whether or not the purchaser signed an order waiving the weighing.

ILLINOIS: In *City of Savanna* v. *Robinson* (1898), 81 Ill. App. 471, the Appellate Court, Second District, held invalid an ordinance of the City of Savanna requiring all coal sold in the city to be weighed by the city weighmaster

on the ground that the legislature had not granted power to cities in Illinois to pass such an ordinance. The Court said, however:

> "The authority is abundant, and it is conceded by counsel, that the legislature has the power to authorize cities to erect scales, appoint a weighmaster and require all coal sold or offered for sale in the city limits, to be first weighed by such weighmaster; * * *" (p. 478.)

This case was, of course, overruled by the decision of the Supreme Court of Illinois in *City of Chicago* v. *Wisconsin Lime & Cement Company,* (1924), 312 Ill. 520 and in the instant case.

IOWA: In *Davis* v. *Town of Anita* (1887), 73 Iowa 325, 35 N. W. 244, the Supreme Court of Iowa sustained the validity of an ordinance of the Town of Anita declaring certain scales in the town to be "city scales," providing for the appointment of a suitable person as weighmaster, and further providing that it should be unlawful for any person to sell certain commodities sold by weight when the quantity of the article exceeded 1,000 pounds without having the article weighed upon the city's scales. In *State* v. *Smith* (1903), 123 Iowa 654, 96 N. W. 899, the Court upheld an ordinance establishing and regulating a city market, providing for city scales, and requiring all hay, straw, oats or corn sold within the city and for consumption therein to be weighed on the city scales.

KENTUCKY: In *Collins* v. *City of Louisville* (1841), 41 Ky. Rep. (2 B. Mon.) 134, an ordinance of the City of Louisville was held invalid solely for the reason that the fees charged were manifestly a tax on the commodity. The Court conceded for the purpose of the argument that the city had power to compel the measurement of all coal

vended in the city and to require the vendor to pay for the measurement.

MINNESOTA: In *State ex rel. Stone* v. *Eck* (1913), 121 Minn. 202, 141 N. W. 106, the Supreme Court of Minnesota sustained the validity of an ordinance of the City of Crookston making it unlawful to buy or sell in the city any hay, straw, coal or firewood sold or bought by weight or measurement without first having the same weighed or measured by the city weighmaster and obtaining his certificate. The ordinance made an exception in the case of quantities of less than 500 pounds or half a cord. In *Vega S. S. Co.* v. *Consolidated Elevator Co.* (1889), 75 Minn. 308, 77 N. W. 973, the Court held that the legislature had no power to make a certificate of weight issued by a state weighmaster conclusive between the parties, but conceded that it might give the certificate a high character as evidence.

MISSISSIPPI: In *Gaines* v. *Coates* (1875), 51 Miss. 335, the Supreme Court of Mississippi upheld an ordinance of the City of Vicksburg which provided that it should not be lawful for any merchant or other person to weigh any bales of cotton with a view to purchasing it or to purchase any bales of cotton after having been weighed in the city by any person other than the city cotton weigher. The office of cotton weigher was created by the charter of the city which made it the duty of the cotton weigher to weigh or cause to be weighed under his direction and authority all cotton sold in the City of Vicksburg.

MISSOURI: In *Sylvester Coal Co.* v. *City of St. Louis* (1895), 130 Mo. 323, 32 S. W. 649, the Supreme Court of Missouri sustained the validity of an ordinance of St. Louis making it unlawful for any person to do any weighing on any scales in the city, and to receive a fee for such weighing, except, *first*, public scales for which a weigher had

been appointed by the mayor; *second,* scales owned by private parties authorized by acts of legislature; and, *third,* all private scales, the weighers of which should have been approved by the mayor and should have taken an oath before the register and filed a bond. The ordinance further made it unlawful for any person to buy or sell hay or stone coal until the same had been weighed by one of the legally authorized weighers and a certificate of the weight thereof given. The provisions of the ordinance are set forth in some detail in the opinion. In *City of St. Charles* v. *Elsner* (1900), 155 Mo. 671, 56 S. W. 291, the Court upheld an ordinance of the City of St. Louis providing for the appointment of weighers for three public scales maintained by the city, and providing further that no person should buy or sell any corn or stone coal in the city in quantities exceeding fifteen bushels or any hay in quantities exceeding 500 pounds until the same should have been weighed by one of the city weighers on one of the city scales and a certificate of the weight given. In *State ex rel. Barker* v. *Merchants Exchange of St. Louis* (1916), 269 Mo. 346, 190 S. W. 903, the Supreme Court of Missouri had before it the statute which was later sustained by this Court in *Merchants Exchange etc.* v. *State of Missouri ex rel. Barker,* 248 U. S. 365. Among other things, the Missouri court said:

> "To say that these laws do not tend to the public welfare would be a traversty upon the law. Thirty-five states of the Union have laws similar to these laws, although they may effect different commodities. Many of them are gray from age. Such laws are usually directed to the chief commodities of the different states. In one it may be coal, whilst in others it is cotton, lumber, tobacco, or some leading product." (p. 905.)

In *City of Lamar* v. *Weidman* (1894), 57 Mo. App. 507, the Kansas City Court of Appeals held invalid one section of an ordinance which provided that if any person other than the city weigher should take a fee for weighing he should be guilty of a misdemeanor. The Court, however, expressly conceded that the city had power to pass an ordinance providing that the seller should not offer a commodity for sale without the production of the municipal weighmaster's certificate (see p. 513).

NEW YORK: In *Stokes & Gilbert* v. *City of New York* (1835), 14 Wend. 87, the Supreme Court of Judicature of New York sustained the validity of an ordinance of the City of New York requiring anthracite coal to be sold by weight, and that it be weighed by weighmasters not exceeding six in number appointed by the common council, and imposing a penalty upon any vendor of coal who should sell any anthracite without its first being thus weighed.

NORTH CAROLINA: In *State* v. *Tyson* (1892), 111 N. Car. 687, 16 S. E. 238, the Supreme Court of North Carolina upheld an ordinance of the town of Norwood providing that its commissioners should elect annually a cotton weigher, that he should be paid eight cents per bale weighed, one-half by the buyer and one-half by the seller, and that any person who sold cotton within its limits without having it weighed as prescribed should be deemed guilty of a misdemeanor. In *City of Raleigh* v. *Sorrell* (1853), 46 N. Car. 49, an ordinance of the City of Raleigh was upheld requiring that all fodder, oats, hay, and other provender sold in the city should be weighed at the public scales, the weighmaster to give a certificate of the weight, and further providing that any one selling these commodities without the same being thus weighed should be fined.

OHIO: In *City of Cincinnati* v. *Broadwell* (1857), 3 Ohio Dec. (Reprint) 286, a decision of a common pleas

court, the Court had before it an ordinance of the City of Cincinnati establishing the office of city weigher, a section of which provided that no person other than the city weigher and his deputies in the city should follow the business of weighing under a penalty of from $5.00 to $10.00. The ordinance did not require individuals to have their merchandise weighed nor did it give the city weigher the right to interpose between the vendor and vendee. The Court held that the council had exceeded its authority by undertaking,

> "to go beyond this, and to interfere with the trade or business, not for the purpose of protecting parties from fraud, but to enforce this."

OKLAHOMA: In *Taylor* v. *Anderson* (1914), 40 Okla. 316, 137 Pac. 1183, the Supreme Court of Oklahoma held invalid a statute providing for reweighing by cotton weighers and making the finding of fact of weight by the cotton weigher conclusive between buyer and seller. The reason for the holding was in the effect given to the finding by the cotton weigher. But the Supreme Court of Oklahoma has held that a municipality may establish public scales and provide for public weighmasters. *Oklahoma City* v. *Colt*, (1913) 40 Okla. 202, 137 Pac. 359.

PENNSYLVANIA: In *O'Maley* v. *Borough of Freeport* (1880), 96 Pa. 24, the Supreme Court of Pennsylvania sustained as valid an ordinance which is described in the opinion as "requiring the weighing of coal and the payment of five cents for each load delivered in said borough."

SOUTH CAROLINA: In *Charleston* v. *Rogers* (1823), 13 S. Car. L. Rep. 293 (2 McCord, 495), an ordinance of the City of Charleston was upheld which required that coal should be sold by the ton, that the coal should be measured in a certain manner by the city inspector at the ex-

pense of 25c a ton, to be paid by the seller, and that any seller who sold coal contrary to the provisions of the ordinance should be fined in an amount equal to the value of the coal thus sold. In *Sumter* v. *Deschamps* (1872), 4 S. Car. 297, the Supreme Court of South Carolina held invalid an ordinance of the Town of Sumter requiring weighing of cotton by the public weigher. The reason for the holding, however, was that such an ordinance was not within the charter power of the city under the state law. In *Barfield* v. *Stevens Mercantile Co.* (1910), 85 S. Car. 186, 67 S. E. 158, the Supreme Court held invalid a statute providing for the election of a cotton weigher at Bethune on the ground that the statute violated the prohibition in the state constitution against special legislation.

TEXAS: In *Davidson* v. *Sadler* (1900), 23 Tex. Civ. App. 600, 57 S. W. 54, the state statute was upheld providing for the election of public weighers and making it unlawful for any factor, commission merchant or other person to employ any other than a public weigher or his deputies to weigh cotton or other merchandise. In *Martin* v. *Foy* (1921), 234 S. W. 698, there is an interesting review of the Texas law on the subject of public weighers, although no holding is made directly applicable to any point raised in the instant case.

WISCONSIN: In *Yates* v. *City of Milwaukee,* (1860), 12 Wis. 673, the Supreme Court of Wisconsin sustained as valid an ordinance of the City of Milwaukee providing that no person should expose for sale any load of hay in certain wards without first having the hay weighed by the attendant of some established and sealed city hay scale within the city limits and obtaining a written certificate of the weight from the attendant. In *Brittingham & Hixon Lumber Co.* v. *City of Sparta* (1914), 157 Wis. 345, 147 N.

W. 635, the Supreme Court of Wisconsin sustained an ordinance of the City of Sparta providing that all coal offered for sale and delivered within the city limits, except in carload lots, should first be weighed on the public city scales by the weighmaster and the weighmaster should give to the owner a written ticket showing the quantity of coal contained in the load. The case is particularly interesting because many of the same contentions that are made by the appellant in the instant case on the score of the unreasonableness of the ordinance were made and ruled upon by the Supreme Court of Wisconsin.

MANITOBA: In the case of *In re Miller* v. *Town of Virden* (1906), 16 Man. 479, an ordinance of the Town of Virden was held valid which provided that all coal sold by weight within the town should be weighed before delivery upon the public weigh scales, etc.

From the foregoing review of cases it will be observed that the power of the state to protect the buyer from short-weighing by compulsory weighing on public or on licensed scales has been sustained in every instance. The only occasions on which such statutes or ordinances have been held invalid have been the result of some particular objectionable feature unconnected with the theory and principle of such legislation. For example, in two cases it has been held that a particular city did not have power under its charter or under the state law to pass such an ordinance. *City of Savanna* v. *Robinson*, 81 Ill. App. 471; *Sumter* v. *Deschamps*, 4 S. Car. 297. In two cases such ordinances have been held invalid because it was obvious that the fees charged for weighing were for revenue and not for the purpose of meeting the expense of regulation. *Taylor* v. *Pine Bluff*, 34 Ark. 603; *Collins* v. *Louisville*, 2 B. Mon (Ky.) 134. In one case a statute made applicable by its terms to

a single city was held within the prohibition of the state constitution against special legislation. *Barfield* v. *Stevens Mercantile Co.*, 85 S. Car. 186, 67 S. E. 158. In several cases, provisions making the weighmaster's finding as to weight conclusive between buyer and seller have been held invalid. *Taylor* v. *Anderson*, 40 Okla. 316, 137 Pac. 1183; *Vega S. S. Co.* v. *Consolidated Elevator Co.*, 75 Minn. 308, 77 N. W. 973; *City of Cartersville* v. *McGinnis*, 142 Ga. 71, 82 S. E. 487. In two cases particular provisions forbidding all weighing except by public weighmasters were held invalid. *City of Lamar* v. *Weidman*, 57 Mo. App. 507; *Cincinnati* v. *Broadwell*, 3 Ohio Dec. Reprint 286.

The ordinance under consideration in the case at bar by its terms affects alike all those who deliver coal and similar commodities in load lots in the City of Chicago. No good reason is seen why nonresidents of the city should be exempted from its provisions when residents are required to conform to them. By enforcing the ordinance against nonresident as well as resident dealers in coal, it cannot, we submit, be held to deny to a nonresident the equal protection of the laws guaranteed by the Fourteenth Amendment. If appellant were relieved of its requirements, then the ordinance might be subject to successful attack by local truckers and dealers on the ground of unlawful discrimination. It is apparent that appellant is not demanding the equal protection of the laws but rather a special privilege under them.

Appellant does not question the constitutionality of the ordinance as applied to Chicago coal dealers. He concedes (Appellant's brief in opposition to motion to dismiss or affirm, p. 25) that the power to enact a reasonable ordinance which regulates methods of weighing coal or other commodities sold in load lots is within the police

power of the municipality, but contends that the ordinance is unreasonable when applied and enforced against him while hauling coal from outside the city. (Appellant's brief in opposition to motion to dismiss or affirm, p. 13.) He claims that because of the enforcement of the ordinance against him, he is required to rehandle the coal in Chicago at an increased cost, and due to the rehandling the coal, which is soft surface mine coal, is broken down and the grade altered. The extravagant contention is then made that this results in the total destruction of appellant's "lawful and legitimate business."

There is of course in the record no evidence to support such a contention by appellant; nothing but the argumentative statement made by Ralph C. McElvain, president of the Morris Coal & Mining Co., who speculates as to the probable cost and effect upon his company's business of complying with the ordinance, by establishing a coal yard in Chicago and weighing coal on scales of Chicago public weighmasters (R. 19). Appellant Hauge is a mere trucker who owns no coal but merely hauls coal for a Chicago coal dealer or agent from a mine located outside the city. He makes no showing by competent evidence that his trucking business would be injuriously affected by the requirement of the ordinance that the coal be weighed on Chicago public weighmasters' scales.

The Chicago coal user needs protection in the matter of dishonest weights when he buys coal from established Chicago coal dealers who are directly under the supervision of the city's Weights and Measures Department. To a greater degree the user needs protection when coal is delivered to him by irresponsible, itinerant, part-time coal truckers, using a miscellaneous lot of vehicles instead of regular coal trucks, from a strip mine sixty-two miles from

Chicago, which mine assumes no responsibility over the truckers (R. 18). If the ordinance were not enforceable against appellant and those similarly situated with him, then the conditions prevailing prior to its enactment, recounted in Point I of this brief, would recur, and practices of fraud, short-weighing and chicanery again prevail and the public would be victimized by the nefarious practices already referred to.

The ordinance can be complied with by any legitimate and honest dealer or trucker.

It is not startling that appellant, who lives in Morris, Illinois, sixty-two miles from Chicago, should find some inconvenience, some expense attached to the business of delivering coal to Chicago consumers. Doubtless it would be more convenient and less expensive to him if he were not required to comply with the terms of the ordinance and if he were relieved from any weighing except that done at the mine. This, however, would not meet the requirements of the ordinance and would not protect the customer, for whose benefit the ordinance was enacted.

Appellant states that he is at a disadvantage compared with persons who own Chicago coal yards and who may become public weighmasters and weigh their own coal. Here he argues a hypothetical case of a downstate coal mine or coal dealer, not a party to this litigation. There is however nothing in Chicago's ordinance which would prevent a nonresident coal company or a nonresident trucker from maintaining a coal yard in Chicago, establishing an agent in the city who might readily qualify and be bonded as a public weighmaster and who might weigh upon his public weighmaster's scales any coal originating from the downstate mine or coal company. Of course, the weighmaster's ordinance has no extraterritorial effect and in

order to be licensed as a public weighmaster the individual would be required to be established in Chicago and subject himself to the regulatory provisions of the city's Weights and Measures ordinance, otherwise he would escape supervision and punishment for misfeasance.

On page 36 appellant comments upon the fact that there is no provision for licensing weighmasters outside of Chicago and he states that prior to the year 1935 the Morris Coal and Mining Company had a license as a public weighmaster which the city refused to renew on the ground that the scale at the mine was not located in Chicago. He then states that it is a fair inference that the real reason that this license was refused was that coal trucked from Morris was becoming a competitve influence in the Chicago market. This is not a fair inference. The proper inference to be drawn from appellee's refusal to license public weighmasters at Morris, Illinois is that the city could not supervise the activities of nonresident weighers functioning outside the city. They would not be subject to prosecution and punishment by the city and there would be no way to protect the public against fraudulent weights and dishonest practices committed outside the city but affecting consumers in the city in the handling of coal by an irresponsible group of truckers.

In this connection appellant cites, on page 36 of his brief, the case of *State* v. *Nelson,* (1896), 66 Minn. 166, 68 N. W. 1066. This case merely held that *an applicant for a license* to sell milk within a city might be required *to consent* that the dairy herd from which he obtained his milk be inspected by the city health commissioner although the herd was kept outside the city. This was a license case involving consent by a nonresident licensee to a city inspection outside the city and most certainly did not hold

that the city could be compelled to inspect herds outside its limits. On the contrary the implication is that the city had no such extraterritorial power but that it could obtain it if the owner of the herd consented and that it could make such consent a condition precedent to the issuance of a license. The case bears no analogy to this case. *Hill* v. *Fetheroff*, (1912), 236 Pa. 70, 84 Atl. 677, cited by appellant on page 37 of his brief, involved the same kind of consent license ordinance and is equally without signifiance here. Appellant argues that since a city may, under these cases go outside its limits with the consent of the licensee, therefore it must do so in this case or else the ordinance is unreasonable. The cases are not authority for any such proposition.

On page 3 of his brief Hauge says that it was not disputed by the city that in order for him to comply with the ordinance it would be necessary to unload the coal within the city to obtain the tare weight of the vehicle, then reload the coal to obtain the gross weight of the vehicle and the coal. The ordinance, of course, speaks for itself. It does not prescribe unloading. The ordinance which regulates public weighmasters (section 3623, R. 41) provides in part as follows:

> "In no case shall any public weighmaster state in his certificate the tare weight of any vehicle until after he shall have weighed the vehicle in such manner as to secure the weight as specified herein."

This leaves the manner and time of ascertaining the tare weight to the public weighmaster. To give value and dependability to the weight certificate it must state the true net weight of the coal, and in order to be able to state the net weight the public weighmaster must ascertain the gross and tare weights before making his certificate. If, due to

the manner in which a nonresident conducts his business and due to his nonresidence, it becomes necessary for him to unload coal in order to enable a weighmaster to get the weight of his vehicle, any attendant expense or inconvenience is a mere incident to the business the nonresident elects to transact in the city. The ordinance itself is not more burdensome upon the nonresident than upon a resident. Chicago coal dealers who receive coal at their city yards by steamer, railroad car or motor truck are required to handle the coal. They must unload and reload it. There is nothing in the ordinance to prevent a nonresident coal company or dealer from establishing a coal yard in Chicago or from securing the appointment of a resident agent as a public weighmaster. There is no discrimination made by the ordinance against a nonresident. It applies alike to all who deliver coal in Chicago in load lots. If it had exempted nonresidents, obviously it would then unlawfully discriminate against residents. If the burden of complying with it is greater in the case of a nonresident it is an incident merely to his nonresidence.

Regarding this point the Illinois Court said (R. 50):

> "The defendants, nonresidents of the city of Chicago, are asking for a practice of weighing, as applied to the business done by them in the city, which under the ordinance here would not apply to those truckers living in the city and delivering coal from the local yards or local dealers in the city to the consumer. To recognize the demand of the defendants would be to discriminate between the local truckmen and dealers in Chicago in favor of non-residents."

A bonded public weighmaster could not truthfully certify the net weight of a load of coal if he could not ascertain

the tare weight of the vehicle. The weighmaster must be given the right to weigh the vehicle at the time he issues his certificate. We have already pointed out, under Point II of this brief, that a weighing at one time to ascertain the gross weight of the coal and the vehicle and a weighing at another time to ascertain the tare weight of the vehicle, with an interval between the two weighings, would not comply with the ordinance or be effective to prevent fraud upon the consumer. To give protection to the purchaser of a truck-load of coal, the ordinance is sound when it requires that a certificate showing the true net weight be delivered before the coal is unloaded into the customer's coal bin or upon his premises and before he is required to pay for the coal, and before an unknown, nonresident trucker departs.

Whether the enforcement of the ordinance injuriously affects the business of the strip mine owned by the Morris Coal and Mining Company is not directly involved in this case. Even were it involved, it is not seen how that company would be entitled to enjoy the business of selling coal in load lots by weight to Chicago inhabitants except under the regulations applicable to all dealers of load lots.

Appellant relies upon the statement contained in the state judges' dissenting opinion to the effect that it is quite as much to the interest of the public welfare that the people of the City of Chicago be afforded access to cheap markets for the necessities of life as it is that weights be watched. We yield to no one in desire to promote the public welfare of the people of Chicago. It is believed that the viciousness of short weighing is not fully understood by the dissenting justices. It is of vastly greater importance to the consumer in the long run that he get full weights and

measures than that he get cheap coal. The cheap coal would cease to be cheap if the weight of it were short.

The decisions of this Court which appellant relies on to sustain his claim of unconstitutionality are *Jay Burns Baking Co.* v. *Bryan,* 264 U. S. 504, 513; *Dobbins* v. *City of Los Angeles,* 195 U. S. 223, 235, 240; *Pierce* v. *Society of Sisters,* 268 U. S. 510, 534, 535; *Weaver* v. *Palmer Bros. Co.* 270 U. S. 402, 412, 415; *Fairmont Creamery Co.* v. *Minnesota,* 274 U. S. 1, 9, 11; *Louis K. Liggett Co.* v. *Baldrige,* 278 U. S. 105, 113. These cases announce the general principle that States, under the guise of protecting the public, cannot *arbitrarily* interfere with private business or *arbitrarily* prohibit lawful occupations or impose *unreasonable and unnecessary* restrictions upon them. We are confident that this Court, when examining the ordinance under review, will not find it to be an arbitrary interference with private business or an arbitrary prohibition against a lawful occupation or that it imposes unreasonable and unnecessary restrictions upon them.

Where, as in the case at bar, the opportunity to defraud the customer in the sale of coal is great and the consumer has no adequate way to protect himself against being cheated, where the delivery of true weights of coal to the consumer is a matter clearly related to the public welfare, where the city has been given express authority to enact the ordinance, where the municipal legislative body knows best what the conditions are that require regulation, where the ordinance bears a reasonable relation to the exercise of the power belonging to the municipal legislative body, where the ordinance affects alike residents and nonresidents of the city and every merchant delivering any commodity in load lots, we respectfully submit that the ordinance before the Court is not susceptible to the charge

made against it of being in violation of the Fourteenth Amendment.

The case of *City of Chicago* v. *Kautz*, (1924), 313 Ill. 196, 144 N. E. 805, cited by appellant in support of his claims that the ordinance arbitrarily interferes with private business, has no bearing upon the case at bar for the reason that we are not here concerned with an attempt to have appellant reweigh his coal after having it once weighed over a Chicago public weighmaster's scales.

On page 25 of his brief appellant cites *May Grain & Coal Co.* v. *Kansas City, Mo.*, (1935), 10 Fed. Supp. 792, a case decided in 1935 by the District Court for the Western District of Missouri, Western Division. This case held that an ordinance which expressly provided that a nonresident coal dealer, who had a coal yard one-half mile outside the city, must establish a coal yard inside the city in order to do business there, was unreasonable and void. The court held the ordinance unreasonable because it appeared that the city could have inspected the yard outside the city without inconvenience and because the administration of the ordinance was discriminatory in that the other nonresident coal dealers were not molested. Even assuming that the decision is sound, the considerations which led the judge to hold as he did are lacking in this case. But more important is the fact that the Chicago ordinance, unlike the Kansas City ordinance, makes no requirement whatever that appellant establish a coal yard in Chicago; there is nothing to prevent appellant from solving the question of how to weigh his coal in any way he sees fit, provided the weighing complies with the ordinance. True, he may establish a coal yard but he need not; he may go to any public weighmaster who has a yard and use that. If he thinks he must have a coal yard it is not the ordinance

which requires it but a situation for which he alone is responsible.

Appellant's charge in Point III of his brief that the City of Chicago is using this ordinance for the improper purpose of protecting local coal dealers from competition is without a particle of evidence to support it and is highly prejudicial and unjust.

Conclusion.

Though difficulty has been met with in answering appellant due to his attempts to overstate the record in this court, it is obvious that he has failed in showing that the ordinance is so unrelated to the public welfare, so unreasonable or arbitrary, so "unmistakably and palpably in excess of legislative power" as to render it violative of the Fourteenth Amendment. All that he has done has been to find fault with the ordinance and argue that it should have been drafted differently and so as not to inconvenience him in his business. A complete answer to him is contained in the pronouncement of this court made when it upheld the validity of Chicago's theater license ordinance in the case of *Metropolis Theatre Co.* v. *Chicago*, (1913), 228 U. S. 61. On page 69 of the opinion Mr. Justice McKenna said:

> "To be able to find fault with a law is not to demonstrate its invalidity. It may seem unjust and oppressive, yet be free from judicial interference. The problems of government are practical ones and may justify, if they do not require, rough accommodations —illogical, it may be, and unscientific. But even such criticism should not be hastily expressed. What is best is not always discernible; the wisdom of any choice may be disputed or condemned. Mere errors of

> government are not subject to our judicial review. It is only its palpably arbitrary exercises which can be declared void under the Fourteenth Amendment; and such judgment cannot be pronounced of the ordinance in controversy. *Quong Wing v. Kirkendall,* 223 U. S. 59."

Appellant's case presents a legislative matter, not a judicial one.

It is respectfully submitted that the decision of the Supreme Court of Illinois upon the constitutionality of the ordinance is sound and that the judgment of that court should be affirmed.

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